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WM. R. STAN

—IN THE—

United States Supreme Court

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

Brief for Respondent.

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ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

CERTIORARI TO CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

Statement, Brief and Argument of Respondent.

STATEMENT

Road District No. 7 was created by Act No. 322 of the General Assembly of Arkansas in 1919 (See Acts of Arkansas 1919, Road Vol. 2, page 1413). This special Act was attempted to be cured by Act No. 45, extraordinary session of 1920. (For said Act see page 66 appendix to petitioner's brief).

The district is composed of forty-two sections of land shown on map attached to this brief, mark-

ed Exhibit "A", the same being exact duplicate of Exhibit "A" attached to abstract and brief of respondent filed in the United States Circuit Court of Appeals and is a clarified copy of map attached to transcript of record at page 30.

At the July Term, 1919, of the County Court of Poinsett County, Arkansas, and prior to the time of the formation of Road District No. 7 and prior to the filing of the approval of the assessment of benefits in said Road District, Drainage District No. 7 of Poinsett County, Arkansas, by special Act of the Legislature (see Acts of Arkansas, 1917, Volume 1, page 1053) had appropriated for use as a right of way for the construction of a drainage canal the area marked "Floodway Drainage District No. 7" containing three thousand acres of land which, as will be seen from an examination of the map (Exhibit "A", attached to this brief) runs diagonally through the Road District. The lands embraced in this floodway were included in the Road District and assessed for benefits therein. The proposed roadway was nine miles in length and was located upon the range line lying between Ranges 5 and 6. No highway existed along the proposed route.

The estimated cost of the improvement as shown in the case of Taxpayers of Road District No. 7 vs. Road District No. 7, et al., brought and tried in the Chancery Court of Poinsett County was $750,000.00. The assessment of benefits was $462,000.00. (See transcript of record page 18). The benefits assessed against the three thousand acres of land in the floodway aggregated approximately, $70,000.00, (See transcript of record page 15) so that the actual benefits in the District did

not exceed in the aggregate $400,000.00. The lowest estimate on the cost of the construction of the improvement was $450,000.00. (See transcript of record p. 30). This proposed Road District, as heretofore stated, was formed not under the general law but by Special Act of the Legislature and at no time was any notice given of the assessment of benefits or of the filing of the plans of the proposed improvement in the county court, as prescribed by said Act 322. (See transcript of record p. 14). At the time the pretended assessment of benefits was filed December 16, 1919 (See p. 28 transcript of record) none of the lands south and east of the St. Francis River and now in the proposed District were in the District and the commissioners could not therefore, in the manner attempted, assess benefits on lands not in the District. This fatal defect was attempted to be cured by said Act No. 45. So it will be observed that the land owners in the District never had an opportunity to protest against this high-handed method of taking their property without due process of law. In December, 1920, as soon as the land owners discovered that their lands were to be taken from them, suit was filed in the Chancery Court of Poinsett County, Arkansas, by Weona Land Comany, et al., land owners, against the District, its commissioners and the Construction Company, attacking the legislative assessment of benefits on the grounds that the assessment was void as being arbitrary; that demonstrable error had been committed by the Legislature in making the assessment because the Legislature attempted to assess for benefits thereof lands which had been previously taken and appropriated for use by Drain-

age District No. 7 aggregating three thousand acres and which lands are now in use by said Drainage District; and upon the further ground that the cost of the construction of the road improvement exceeded the benefits.

At the May Term, 1922, of the Chancery Court of Poinsett County a decree was rendered in favor of plaintiffs, declaring the assessment of benefits and the plans and specifications filed in the office of the County Clerk December 16, 1919, and Act No. 45 of 1920 to be void, for the reasons that the plans and specifications, assessments of benefits, and the Act of the Legislature undertaking to approve and confirm the same, contained a material change in the plans; that the floodway of Drainage District No. 7 had taken and appropriated three thousand acres of land which could not be assessed for benefits in Road District No. 7 and, therefore, the assessment of benefits and plans and specifications thereunder were declared void. No appeal was taken from this decree and it became final.

Bonds of the District were issued in the sum of $230,000.00, dated April 1, 1919, though they were not, in fact, issued until after the 4th of February, 1920, (See transcript of record p. 11) the date of the approval of Act No. 45. (See appendix to brief of petitioner p. 68). These facts were known to Gould and to Otis & Company, the bond brokers. On June 15, 1920, (See transcript of record p. 26) James Gould delivered to Otis & Company the $230,000.00 in bonds and received from Otis & Company $17,250.00 (See transcript of record p. 27). There is no evidence in the record showing that Gould had any right to the posses-

sion of these bonds. The remaining $212,750.00 was retained by Otis & Company and credited to Road Improvement District No. 7 and the payments to the District were made in installments from time to time, beginning September 3, 1920, and ending February 27, 1922. On February 15, 1921, (See transcript of record p. 32) Otis & Company were notified of the pendency of the suit in the Chancery Court of Poinsett County to cancel the assessment of benefits and carried on a correspondence with the Chapman & Dewey Company, landowners in the District, concerning the same. Most of the money paid out by Otis & Company, aggregating $111,000.00, was unlawfully made away with by Gould and one of the commissioners of the District. Practically all the bonds are in the hands of Otis & Company.

Section 20 of said Act 322 provides that in case of default in the payment of bonds or interest it shall be the duty of the CHANCERY COURT OF POINSETT COUNTY to appoint a Receiver to collect the taxes. Notwithstanding this provision of the Act of the Legislature on August 15, 1922, petitioner filed its complaint in the United States District Court, alleging default in the payment of interest on the bonds and praying for the appointment of a receiver. The land owners of Road District No. 7 appeared and were made parties, contested the proceedings and challenged the the jurisdiction of the court. A decree adverse to the land owners was rendered in the United States District Court, whereupon the land owners appealed to the United States Circuit Court of Appeals for the Eighth Circuit, where a decree was rendered dismissing the bill, without prejudice, at the cost

of the plaintiff, appellee in said court. For decree and opinion of United States Circuit Court of Appeals see pages 46 to 49 of transcript of record. The decree of United States District Court contained *inter alia* the following:

> "It is further considered, ordered and decreed that the Receiver heretofore appointed in this cause *will proceed to collect the taxes heretofore levied* upon the real property within said district, but in view of the fact that only $125,000.00 of said bonds will be outstanding, the rate of taxation fixed at the time of the issuance of said bonds will be reduced to two per cent. upon the assessment of benefits in each of the years 1922 to 1924, inclusive, and 3.2 per cent. of the amount of the assessed benefits for each of the years 1925 to 1941 inclusive, and said Receiver will remit to the Chase National Bank of the City of New York, at its office in the City of New York, N. Y., on or before the first day of March and September of each year, the amount necessary to pay the bonds and coupons not surrendered, as they mature, adding to each remittance the sum of 12½ cents for each $100.00 par value of bonds, and the sum of 25 cents for each $100.00 par value of coupons, the same being the agreed compensation to the said bank for paying, cancelling and returning the said bonds and coupons." (See transcript of record p. 20).

Replying to the brief of petitioner we will follow the headings designated in that brief.

"HISTORY OF LEGISLATION"

As we hardly think this court is interested either in the price of cotton or rice in the year 1919 or the number of automobiles in Arkansas, nor in the amount of bonds issued by levee and drainage districts in Arkansas, we will make no further answer to that part of petitioner's brief, except to call attention to the mis-statement at the top of page 12 of petitioner's brief, wherein it is stated as follows:

> "From a credit standpoint they (Road Improvement Districts) had neither lineage to revere nor posterity to protect. They were created to make a certain improvement and when this was done and paid for they ceased to exist," citing *Williams* vs. *City of Fort Smith*, 263 S. W. (Ark.) page 397.

(Section 19, of Act 322, page 1423, Volume 2, Road Acts of Arkansas, 1919, provides as follows:

> "The district shall not cease to exist upon the completion of the roads, but shall continue to exist for the purpose of preserving them and keeping them in repair. To this end, the County Court may, from time to time, make such additional levies, based upon the assessment of benefits, as may be necessary for that purpose."

"REPEALING ACT VOID"

We agree with petitioner that if the bonds of the District are valid and subsisting obligations then the Repaling Act is void. But we do not agree that the bonds are valid or that they ever had legal existence.

The U. S. District Court by its decree held that the bonds were valid obligations of the District, notwithstanding the fact that a court of competent jurisdiction in a suit instituted for the purpose, had declared by its decree from which there has been no appeal, that the assessment of benefits and the plans and specifications for the District were void. It is the uniform holding of the Supreme Court of the State of Arkansas, that all contracts made, attempted to be made or entered into by a road or drainage district under the laws of Arkansas, can have no legal existence until there has been a valid assessment of benefits in the District, and this assessment must be approved by the court, or by lawful act of the legislature. All contracts except for preliminary expenses made before there has been an assessment of benefits are premature, void and unenforcible.

In *Thibault* vs. *McHaney,* Receiver, 119 Ark. 188, it was held that there could be no estoppel in favor of a contractor and against the land owners where the contract was made before an assessment of benefits had been made and lawfully approved. Contracts made in advance of the assessment of benefits, and claims arising thereunder are premature and void and not binding on the District. (Page 199 of Thibault vs. McHaney.)

In *Gould* vs. *Toland,* 149 Ark., 476, it was held that where there was no assessment of benefits in a road improvement district a contract with the bond dealer for the sale of the bonds of the district is unenforcible except as to advances for preliminary expenses.

In *Morgan Engineering Company* vs. *Cache River Drainage District,* 122 Ark., 491, the court

held that a Special Act of the Legislature could not cure a fatally defective district which had previously been created by the Act of the Legislature. The defect consisted in a failure to properly describe the boundaries of the district, and accordingly held that contracts made with the district were void. But the court held that a district void from the beginning could not be cured by a Curative Act of the Legislature passed at a later date.

In *Robinson* vs. *Indiana and Arkansas Lumber and Manufacturing Company,* 128 Ark., 550, it was held that land appropriated for use in an improvement district could not after such appropriation be taxed by the State, much less by a political subdivision of the State.

In the case at bar it was known or in the exercise of reasonable prudence could have been known, by Otis & Company, that Act No. 322, 1919, was void for the reason that there was a failure to describe the district undertaken to be created by the Act or to give its boundaries.

We take it that it is elemental that in undertaking to tax property, whether for local improvements or under the general laws of taxation, it is necessary in order to give the taxing powers jurisdiction to levy a valid tax against the property that the property must be described in the instrument which seeks to levy the tax, and that this description must be sufficiently definite to enable the same to be located with reasonable certainty. It is the uniform rule of the courts of Arkansas that an attempted levy of a tax, either for State and County purposes, or for the purpose of local improvement upon real property, where there has been a failure to describe the real property with sufficient de-

finiteness to enable it to be properly identified and located, is void. Road Improvement Districts under our law are *quasi* public corporations, with such powers only as are conferred by the Act creating them. If the Act creating the District is void because it fails to describe with sufficient certainty the boundaries of the district, then there is a failure to create an improvement district, because an improvement district which does not embrace the property sought to be taxed is a nullity and has no more force or effect than would a deed signed in blank, which failed to describe the property intended to be conveyed.

Act No. 322 undertakes to include within the district all quarter sections of land any part of which is within three miles of said road at any point on the right bank of the St. Francis River. The commissioners of the Road District did not assess the lands in the District for benefits for the reason that there was no description of the lands embraced in the district. Therefore the Legislature could not, by the passage of a Curative Act, cure a thing which was a nullity. If the assessment of benefits in the district had merely been irregular, because of a failure to observe some direction as to procedure, manner and form of taking an oath, or the manner and form of making the assessment, then, of course, the Legislature could cure such irregularity, but the Legislature could not cure, by Act, an assessment that was void from the beginning. This is the effect of the holding in *Morgan Engineering Company* vs. *Cache River Drainage District,* Supra.

The decree of the Poinsett Chancery Court found that the Curative Act undertook to cure an

assessment of benefits against 3,000 acres of land embraced in the floodway of Drainage District No. 7, which lands were not subject to taxation for any purpose. As shown by the map, Exhibit "A," page (30), of the record, this floodway traverses the district from north to south for approximately nine miles, and embraces 3,000 acres of land, upon which it was attempted to assess benefits aggregating $70,000.00. It will also be observed from an examination of this map, that the proposed highway is crossed by this floodway, and that such crossing would have the effect of destroying any supposed benefit to any lands on the west side of the floodway by the construction of a part of the road on the east side of the floodway and vice versa. This floodway divides the district almost in half, and forms an effectual barrier between the lands on the west side and on the east side. The ditches or canals constructed for carrying water in this floodway are each 100 feet in width and an approximate depth of 12 to 14 feet. Levees averaging 15 feet in height are constructed on the east and west boundaries of this canal. It is hardly conceivable that any court would declare such a district to be a valid organization which was so recklessly formed, even though attempted to be formed by an Act of the Legislature.

The decree of the Poinsett Chancery Court held the assessment of benefits attempted to be made invalid because demonstrable error was committed by the Legislature in attempting to assess lands for benefits which could not be so assessed, and that this rendered the entire assessment inequitable and void.

The Supreme Court of the State of Arkansas,

a court of last resort, has uniformly held in such cases, that there can be no valid or binding contract entered into by an improvement district until there has been a valid assessment of benefits. The holders of bonds are certainly entitled to no greater consideration that the holder of any other contract. It is idle to say that the holders of bonds of improvement districts are innocent purchasers for value and without notice. Such bonds are not negotiable paper within the law merchant and have never been received or used as such. Before bond brokers purchase such bonds (and Otis & Company are bond brokers) they require a complete transcript of the record and proceedings of the district, and the opinion of an attorney, as to the validity of the formation of the district. If the brokers have failed to observe the fatal defects in the formation of the district, or if the attorney selected by them has failed to observe such fatal defect, then the loss for such failure should be charged to the brokers or to their attorneys. Otis & Company knew when they were negotiating for the purchase of bonds, that no assessment of benefits had been made at the time of the purported issuance of the bonds, April 1, 1919, because no assessment of benefits of any kind had been made at that time. They knew, if they cared to know, that the district attempted to be formed by Act No. 322 of the Legislature, was void because there was no description of the boundaries of the proposed district. The bonds recite that the assessment of benefits had been cured by Act No. 45, approved February 4, 1920. This was certainly notice to any person of ordinary prudence (save a bond broker), that the assessment of benefits was at least defective be-

fore the Act of the Legislature was passed, and that something must be materially wrong with the bonds, otherwise they would not have been dated April 1, 1919, and at the same time recite the title and date of approval and number of an Act passed February 4, 1920. If investigation had been made by the brokers (and they still own the bonds) as to whether or not the Curative Act was valid. they would have discovered that there was an attempt to assess for benefits 3,000 acres of land in the district, not subject to such taxes, and that the district was void from the beginning for the reason that there was a failure to properly describe the lands attempted to be embraced in the district.

We are therefore confronted with a condition in this law suit which we submit ought not to arise. The land owners in the district by suit in a court of competent jurisdiction have obtained a decision and decree which declares the assessment of benefits invalid and enjoins the collector from undertaking to collect any assessment of taxes within the district, and which has the effect of declaring all contracts, save for preliminary expenses, to be null and void, and this decree has not been appealed from, and in so far as it relates to the taxpayers or to any person suing in the courts of the State of Arkansas, is a valid and binding decree and judgment of the court. On the other hand, we have the decree rendered by the United States District Court for the Eastern District of Arkansas, which in effect, ignores the decree and says that it is not binding on the holders of bonds, because they are innocent purchasers for value and without notice.

The United States Supreme Court has frequent-

ly held, in cases appealed from the United States District Court, in Arkansas, that the holder of county warrants, the obligation of a County, issued so that it passes by delivery and without endorsement, can not be a holder for value and without notice of such county warrant, but that such warrant is at all times subject to inquiry as to the validity of its issue. If this be true, as to a county warrant, why should it not be true as to the bond of an improvement district? Both are political subdivisions of the State, the boundaries of each are defined by the Legislature, and the powers conferred upon them are alike given by the Legislature. An improvement district rests solely upon the Act creating it and it has no power save those conferred by the Act creating it. The obligation which is issued by it can never become the obligation of an individual. It can only be paid by a tax levied on the land. Judgments can be rendered against the land only. The land in the district is liable for the taxes. Certainly improvement districts ought not to be regarded as having the right to issue commercial paper if counties are not permitted to do so.

Thibault vs. *McHaney*, 119 Ark., p. 188;
Gould vs. *Toland*, 149 Ark., p. 476;
Robinson vs. *Indiana and Arkansas Lumber and Mfg. Co.*, 128 Ark., p. 550.

TRIAL

The court erred in holding Otis & Company, not a party to this suit, to be innocent purchasers of $125,000.00 of the so-called bonds, pretended to be issued by this District for the following reasons:

A. Said District Warrants are not negotiable instruments of such character as to be entitled to the rights of innocent purchasers for value because

said so-called bonds are no more than special assessment warrants, payable only out of assessments made against lands within the limits of said alleged Road District No. 7.

C. Because the final decree heretofore rendered by the Chancery Court of Poinsett County, Arkansas, binds all persons, firms and corporations directly or indirectly connected with said district or having any contractual relations with said district.

D. Because said Otis & Company, although not actual parties to said suit in the Chancery Court of Poinsett County, Arkansas, had actual knowledge of the pendency of said suit long before the final decree therein was rendered, and were proper parties to said suit and could have become parties at any time by entering their appearance.

These District Warrants are not negotiable instruments.

The so-called bonds contain the following clause:

> "This bond and the attached interest coupons, as well as all other bonds and coupons forming a part of this issue, are payable out of proceeds of taxes heretofore legally levied upon the real property, railroads and tramroads embraced within said district, and benefited by said improvements, and are secured by a prior lien on all of said real property, railroads and tramroads."

See transcript of record, p. 8.

See *Crawford & Moses*, Stat. of Ark., 1921, Secs. 7767 and 7769; also

Rector vs. *Straus*, 134 Ark., p. 374.

It is to be noted that the Bondholders are parties to this suit through Guardian Savings and

Trust Company, Trustee for all the Bondholders; said Guardian Savings and Trust Company having filed the bill in the Federal Court, and being authorized by the so-called mortgage to take all steps for the enforcement of the rights of the Bondholders. (See transcript of record p. 10).

"SECURITY OFFERED TO BOND PURCHASER"

This is but a repetition of the irrelevant argument contained in "History of Legislation." To support contention that these Road District assessments are not taxes counsel cites two cases; *Illinois Central Railroad* vs. *Decatur,* 147 U. S., 197. This was a case in which this court held that the charter of a railroad exempting it from taxes would not include special assessments; and *Sanders* vs. *Brown,* 65 Ark., 499, where the question was as to the jurisdiction of the Circuit Court over a case involving less than $100.00, the court holding that a warranty in a deed from which was excepted "taxes for 1893" did not include special assessments.

"REASONING AND AUTHORITIES OF THE DECISION OF THE COURT OF APPEALS."

Before making any answer to the comments of counsel for petitioners on the cases cited by Judge Stone in delivering the opinion in the Court of Appeals we must beg to call the court's attention to the persistent habit of counsel for petitioner to dodge the plain provision in Section 20 of Act 322 conferring the right to appoint a receiver to collect taxes upon "The Chancery Court of Poinsett County."

This persistent effort to avoid the language of the Act, delegating the power to collect taxes, occurs at the bottom of page 21 of petitioner's brief and at six other places in the brief. We also beg to call attention to the fact that in the decree rendered by Judge Trieber, in the United States District Court (see page 20 of transcript of record) there is in fact and in law a new levy made, because the rate of taxation fixed at the time of the issue of said bonds was reduced by the decree to 2 per cent. upon the assessment of benefits in each of the years 1922 to 1924 inclusive, and to 3.2 for each of the years 1925 to 1941. This clearly shows the inaccuracy of the statement of counsel for petitioner on page 21 as follows: "In considering the application of these cases, it should be borne in mind that in this case there was a levy of the installments of the assessments of benefits, or *taxes* made in advance for the full term necessary to pay the bonds and made before the bonds were issued." It will be clearly seen from the examination of the decree that the United States District Judge made a new levy for a different amount under the decree long after the issuance of the pretended bonds.

The quotation of Judge Stone in the opinion from the Meriweather case is from the opinion rendered in that case by Mr. Justice Field concurred in by Mr. Justice Miller and Mr. Justice Bradley. Counsel for petitioner quotes from the brief opinion rendered in the Meriweather case by Mr. Chief Justice Waite and the omission of the following from the middle of the quotation, is to say the least, extremely significant. The words omitted are, " if no such authority exists the reme-

dy is by appeal to the legislature which alone can grant relief." On page 25 counsel for petitioner says, "of course, the receiver to be appointed by the Governor to collect taxes was a state officer, and according to familiar rules the Federal Court could not make an appointment to a state office." The three commissioners of Road District Seven were, of course, state officers and if default occurred in the payment of bonds or interest the receiver which the legislature authorized "the Chancery Court of Poinsett County, Arkansas," to appoint would by the same token be a state officer.

The avoidance of the words, "Chancery Court of Poinsett County, Arkansas," occurs twice on page 27 of petitioner's brief. At the top of page 27 counsel for petitioner says, "there is express provision in the state law conferring jurisdiction *on a court of equity* to entertain a suit on the bonds." Near the bottom of the same page 27, counsel for petitioners says, "even without the express provision of the law authorizing a court of equity to appoint a receiver." At the bottom of page 27, counsel for petitioner says, "Court below held that the road district could not mortgage its assessment of benefits." Such a question was not passed on or alluded to by Judge Stone in his opinion. The only reference to it being as follows, "This is a bill brought by a trustee, for bondholders under a *so-called* mortgage to obtain the appointment of a receiver and the payment of past due bonds and interest coupons issued by a road improvement district." We do not think further comment on the unbroken line of authorities cited by Judge Stone to support the proposition that "it is not only not one of the inherent powers of a

court to levy and collect taxes but it is an invasion by the judiciary of the Federal Government of the legislative functions of the state government."

It would seem to us that the decree of the United States Circuit Court of Appeals must be affirmed unless that line of cases is to be overruled by this court.

"A MORTGAGE OF INCOME TO BE REALIZED IN THE FUTURE IS VALID."

Under this heading of petitioner's brief we only beg to call attention to the remarkable admission of counsel in their quotation from *Rees* vs. *City of Watertown*, 19 Wall., 107. After the word "permit" in counsel's quotation the following occurs in the opinion of the court:

> "We can not, however, find authority for so doing, and we acquiesce in the conclusion of the court below that the bill must be dismissed."

"UNITED STATES COURTS WILL ASSUME ALL JURISDICTION THAT THE STATE COURTS COULD ASSUME."

At the top of page 32 counsel for petitioner makes the following remarkable statement:

> "In a case properly within its jurisdiction *the District Court of the United States*, is as much *the Chancery Court of Poinsett County* as is the State Chancery Court and the jurisdiction is expressly conferred on the United States District Court by the Act itself."

In answer to this absurd statement we beg leave to quote from the opinion of Mr. Justice Miller in *Heine* vs. *Board of Levee Commissioners*, 19 Wall., 655-661:

"It is said in argument that plaintiffs have a lien upon the taxable property of the district for the payment of these bonds, and that equity always enforces liens where no other mode of enforcing them exists. Whether this be the true doctrine of a court of equity to the full extent here claimed, we need not decide. Nor need we decide whether taxes once lawfully levied are, until paid, a lien on the property against which they are assessed, though it is laid down in the very careful work of Judge Dillon, that taxes are not liens upon the property against which they are assessed, unless made so by charter or unless the corporation is authorized by the Legislature to declare them to be liens" * * * * * *

"The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, state or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the state. So far as the present case is concerned, the state has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the Legislature, either to assess the tax by special statute, or to vest the power in some other tribunal. It certainly is not vested as in the exercise of an original jurisdiction in any Federal Court. *It is unreasonable to suppose that the Legislature would ever select a Federal Court for that purpose.* It is not only one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal Government of the legislative functions of the State Government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure the end of which no wisdom can forsee."

"THE RIGHT TO A RECEIVER IS A SUBSTANTIVE RIGHT."

The right to have a receiver appointed for the purposes set out in Act 322 is not substantive but is purely remedial. No court has an inherent right to appoint a receiver, or any other person, by whatever name he may be called, to collect or levy taxes.

Under our form of government the power of taxation is in the Legislature. The right to levy and collect taxes can only be acquired by express delegation from the legislative body and can be exercised by no other body or person than the one designated by the Legislature. The Legislature of Arkansas had in this case delegated the power to tax to a Board of Commissioners composed of the following: B. F. Rogers, C. A. Blanton and H. B. Thorne, or, if default was made in the payment of a bond or coupon for thirty days, *"THE CHANCERY COURT OF POINSETT COUNTY, ARKANSAS"* was to appoint a receiver to levy and collect the taxes assessed for this improvement. The appointment of a receiver by any other court than the CHANCERY COURT OF POINSETT COUNTY is contrary to the express delegation of the Legislature of Arkansas and is, therefore, a usurpation of the power of that body. The appointment of the receiver to levy and collect taxes therefore is not on account of the equity powers of the CHANCERY COURT OF POINSETT COUNTY, but on account of an express delegation from the Arkansas Legislature. The right, therefore, is purely remedial and is not substantive so as to be administered by any other court than the CHANCERY COURT OF POINSETT COUNTY, ARKANSAS.

"RECEIVER SANCTIONED BY ARKANSAS DECISIONS."

Under this heading counsel cites one Federal Court decision, *State Bank of Wellston* vs. *Mississippi Valley Trust Company*, 297 Fed., 563, why, we are unable to conjecture.

Judge Sanborn in the opening words of his able opinion in that case says:

> "This case presents the single question whether the taxes levied on the property of a Road District in Arkansas to pay for a road improvement should be applied first to the payment of the first series of bonds issued by that District for $375,000.00, or pro rata to the payment of that series and a subsequent series of $200,000.00 issued by that District."

In the case of *Howard Sevier Road Improvement District No.* 1 vs. *Hunt* cited and quoted on page 51 of petitioner's brief, the question of jurisdiction was neither raised nor passed on.

In the case of *Missouri Pacific Railroad Company* vs. *Sears*, cited on page 52 of petitioner's brief, no question of jurisdiction of a Federal Court was involved and the Receiver was appointed by the *Chancery Court of Fulton County, Arkansas.*

FURTHER GROUNDS FOR LACK OF JURISDICTION OF FEDERAL COURT.

The United States Circuit Court of Appeals in its opinion by Mr. Justice Stone says: "Appellants state fourteen points in their brief, seven of which they argue. In the view taken by this court it is necessary to examine but one of these." Although we feel that the reasoning of the opinion and the authorities cited by the Court of Appeals for its decree dismissing the bill of petitioners, filed in

the United States District Court are correct, we beg to respectfully call the court's attention to other sufficient reasons, as it seems to us, and as urged in the Court of Appeals for dismissing the bill for lack of jurisdiction.

The trial Court erred in taking and exercising jurisdiction in this case for the reason that the Chancery Court of Poinsett County, Arkansas, first acquired jurisdiction of the same matter involved in this suit and both this suit and said suit in equity, *Weona Land Company* vs *Road Improvement District No. 7* of Poinsett County, Arkansas, involving the very matters in controversy in this case, having been filed before this suit was brought and both this suit and that being proceedings *in rem* or at the least, *quasi in rem*, this court has no jurisdiction under the law as laid down by the Supreme Court of the United States in case of *Kline* vs. *Burke Construction Company* decided November 20th, 1922.

The court erred in exercising jurisdiction herein, the Chancery Court of Poinsett County having first acquired jurisdiction.

See *Kline* v. *Burke Construction Company*, 260 U. S., p. 226;

Conclusiveness of proceedings *in rem*, 23 Cyc., p. 1408.

A proceeding had in a proper court for the laying out of a public road is in the nature of a proceeding *in rem* and binds all the world.

23 Cyc., p. 1412.

In *Milcreek Tp.* vs. *Reed*, 29 Pa. St., p. 195, Lewis, C. J., said:

> "The laying out of a public road is in the nature of proceeding *in rem*, and binds all the world."

Farmers Loan & T. Co. v. *Lake St. Elevated*, 177 U. S., 51.

"The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons."

We also beg to call the court's attention to the fact that Section 13 of Act 322 provides that said Board of Commissioners shall enforce the collection by chancery proceedings in the Chancery Court of Poinsett County in the manner provided by Sections 23 and 24 of Act 279. (See page 58 Appendix to petitioner's brief). And that said Sec. 23 provides *inter alia* as follows:

"Said proceedings and judgment shall be in the nature of proceedings *in rem*."

(See page 60, Appendix to petitioner's brief). This would seem to strengthen the authority of the Kline case cited Supra as it is undisputed that the case brought in the United States District Court was a proceeding *in rem* and that the suit in the Chancery Court of Poinsett County was begun before the suit in the United States District Court.

We respectfully submit that the decree of the United States Circuit Court of Appeals Eighth Circuit must at least be affirmed under the authority of the unbroken line of decisions of this court.

J. F. GAUTNEY,
Of Counsel.

HENRY D. ASHLEY,
Attorney for Respondent.

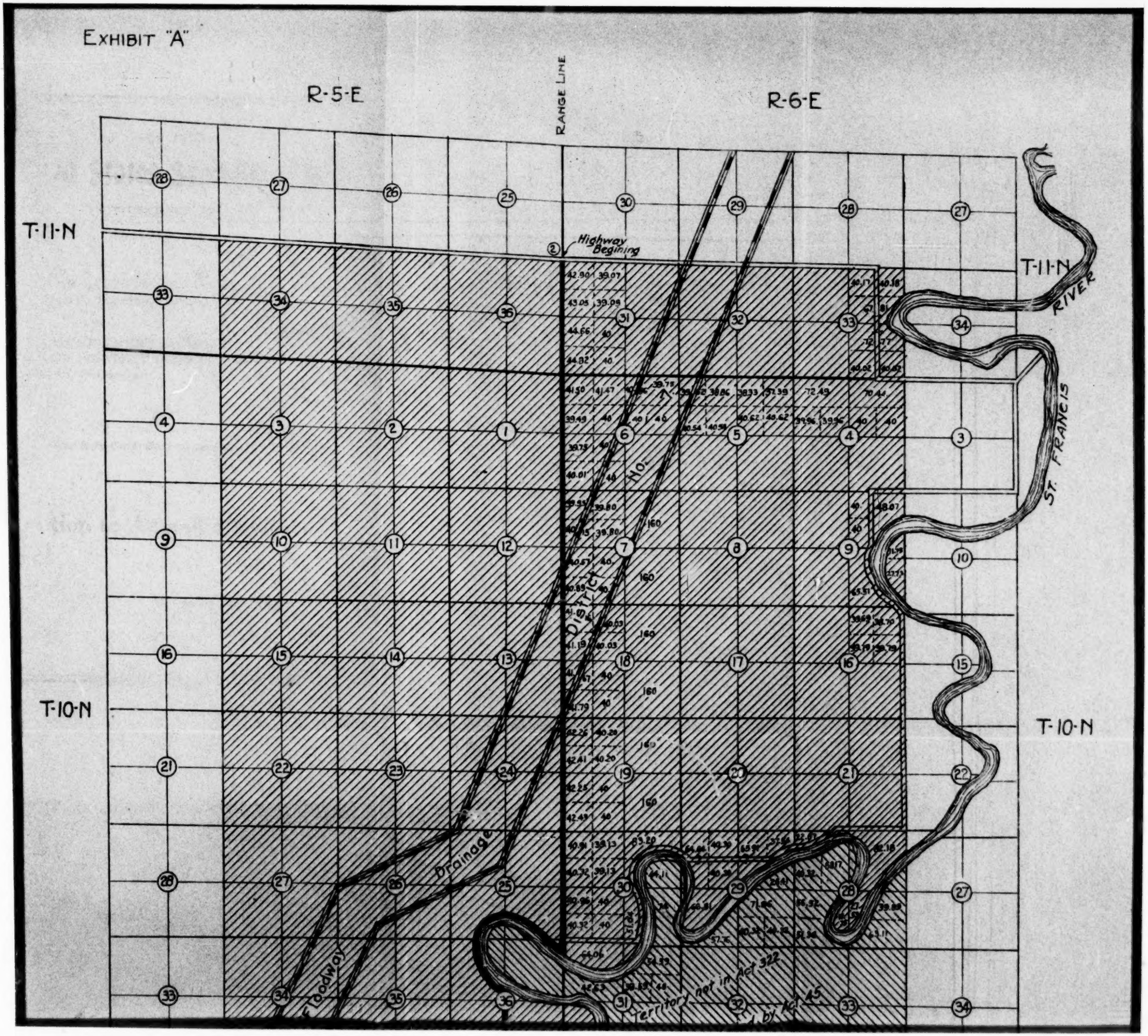
EXHIBIT "A"
R-5-E
RANGE LINE
R-6-E
T-11-N
T-10-N
Highway Begining
RIVER
ST. FRANCIS
DISTRICT
No.
Drainage
Floodway
territory not in Act 322
by Act 45

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SUPREME COURT

—IN THE—

United States Supreme Court

OCTOBER TERM, 1924

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

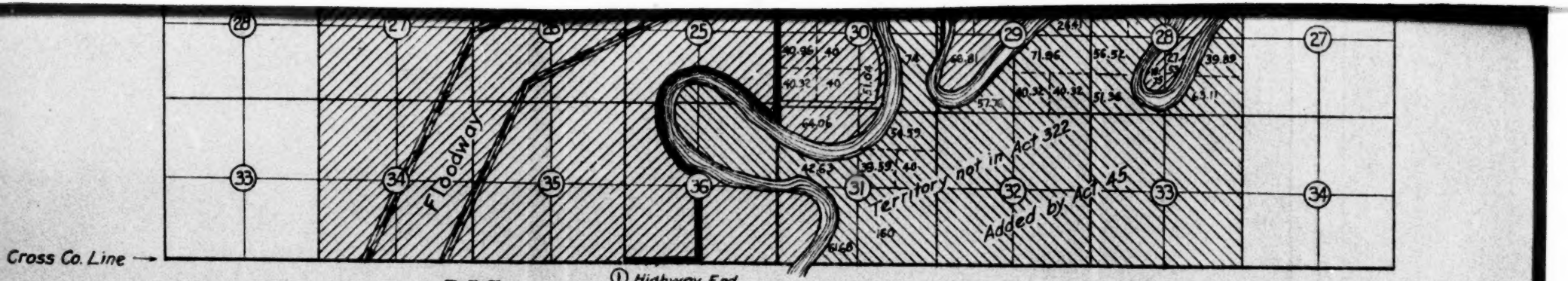
ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

Motion to Amend Judgment.

HENRY D. ASHLEY,
J. F. GAUTNEY,
Attorneys for Respondent.



CROSS COUNTY

MAP
SHOWING PROPERTY INCLUDED IN ROAD IMPROVEMENT DIST. No.7 POINSETT CO. ARK.

Aug. 13, 1921

Territory shown thus ▨ is land described in Amendatory Act No. 45, Extra Ordinary Session 1920, Approved Feby. 4, 1920.

Description of highway shown hereon as contained in Act 322, as amended by Act 45; Begining at N.E. Corner Sec. 36, T-11-N, R-5-E, thence South on Range line between Ranges 5-6 to bank of St. Francis River, thence along bank of river with meandering to center of Sec. 36 T-10-N, R-5-E, thence South to boundary line of said section, thence West on boundary line to line between Secs. 35, 36, T-10-N, R-5-E

All of territory embraced in Road Dist. No. 7 is in Drainage Dist. No. 7, formed prior to Road District No. 7, embracing in its boundaries (Drainage Dist. No. 7) approximately 165,000 acres of land.

Road district No. 7 territory embraces appraximately 26,880 acres, included in said territory is appraximately 3000 Acres condemmed and used by Drainage Dist. No. 7 as a floodway.

—IN THE—

United States Supreme Court

OCTOBER TERM, 1924

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

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MOTION TO AMEND JUDGMENT

Comes now Respondent and files this it's Motion to Amend the Judgment heretofore and on January 19th, 1925, rendered in the above entitled cause in the following particulars and for the following reasons:

1. Said judgment orders, *inter alia*, that the above entitled case be remanded to the District Court of the United States for the Eastern District of Arkansas.

Whereas, it is apparent from the opinion delivered by Mr. Justice Holmes on the same day as said judgment that the mandate in this case should be sent to the United States Circuit Court of Appeals, for the Eighth Circuit.

The final paragraph of said opinion reads as follows:

> "The respondent attempted to open the general merits of the case. If there is anything in the effort, which we do not imply, we shall leave that for further consideration below. The Circuit Court of Appeals regarded the case as stopped at the outset by want of jurisdiction. In that we think it erred.
>
> "Decree reversed."

The decree of the United States District Court for the Eastern District of Arkansas (see transcript, page 18), assuming the jurisdiction of said case, decided the entire case on its merits; upholding the validity of said Road District No. 7, upholding the validity of One Hundred and Twenty-five Thousand Dollars of so-called bonds issued by said Road District and ordering the receiver theretofore appointed by said United States District Court to proceed to collect the taxes and pay said bonds and interest.

On appeal of said case by Respondent to the United States Circuit Court of Appeals that Court reversed said decree solely on the ground that said United States District Court was without jurisdiction. (See 298 Federal, page 272.)

Thereafter this Court, having granted petitioner a writ of certiorari, on January 19th, 1925, delivered its opinion by Mr. Justice Holmes reversing the said United States Circuit Court of

Appeals solely on the ground that said Court erred in its holding that said United States District Court was without jurisdiction, and left the merits of this case "for further consideration below," without declaring whether the said United States District Court or said United States Circuit Court of Appeals was intended. The judgment, however, entered on said 19th day of January, 1925, above referred to remands this case to the United States District Court for the Eastern District of Arkansas.

The fact that said United States Circuit Court of Appeals has only passed on the question of jurisdiction leaving the correctness of said decree on the merits of the entire case unsettled, makes it evident, in order that complete justice may be done, and unnecessary expense and delay avoided, that the mandate in this case should issue to the United States Circuit Court of Appeals, and not to the United States District Court.

This Honorable Court in the case of *Brown* v. *Fletcher*, 237 U. S., page 583, decided in 1915, has passed on the exact question involved in this motion.

We beg leave to quote the final paragraph of the opinion of Mr. Chief Justice White concurred in by the entire Court in the case of *Brown* v. *Fletcher*, loc. cit. 237 U. S., page 588:

> "While it follows from these considerations that the decree below must be reversed, it also results that it is our duty to remand the case to the court below, that is, the Circuit Court of Appeals, to the end that, all questions concerning its jurisdiction as a Federal Court having been determined by the prior decision of this court, it proceed to dis-

charge its duty of hearing and deciding the case conformably to law. Reversed and remanded for further proceedings consistent with this opinion."

Wherefore Respondent respectfully prays that said judgment of January 19th, 1925, be amended by ordering the mandate in this case to go to the United States Circuit Court of Appeals for the Eighth Circuit for further proceedings in conformity with the opinion of this Court.

HENRY D. ASHLEY,
Attorney for Respondent.

J. F. GAUTNEY,
Of Counsel.

I hereby certify that the foregoing Motion for Amendment of Judgment is, in my opinion, well founded, and is not made for the purpose of delay.

HENRY D. ASHLEY,
Attorney for Respondent.

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SUPREME COURT

—IN THE—

United States Supreme Court

OCTOBER TERM, 1924

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

Petition for Rehearing by Respondent.

HENRY D. ASHLEY,
Attorney for Respondent.

J. F. GAUTNEY,
Of Counsel.

—IN THE—

United States Supreme Court

OCTOBER TERM, 1924

GUARDIAN SAVINGS AND TRUST COMPANY, TRUSTEE, *Petitioner*,

vs.

ROAD IMPROVEMENT DISTRICT No. 7 OF POINSETT COUNTY, ARKANSAS, *Respondent*.

No. 389

On Certiorari to the Circuit Court of Appeals for the Eighth Circuit

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PETITION FOR RE-HEARING BY RESPONDENT

Comes now respondent and respectfully petitions this honorable court to grant a re-hearing and order a reargument of the above entitled cause for the purpose of preventing miscarriage of justice and for the following specific reasons:

First: The opinion of this court written by Mr. Justice Holmes is based primarily on the case of *Madisonville Traction Company* v. *St. Bernard Mining Company*, 196 U. S. 239. From the major-

ity opinion in that case rendered by Mr. Justice Harlin, Mr. Justice Holmes presents an able and vigorous dissent concurred in by Mr. Chief Justice Fuller, Mr. Justice Brewer and Mr. Justice Peckham, from which respondent concudes that Mr. Justice Holmes, the writer of the opnion in this case, does not agree with the opinion which he has written but merely submits to the opinion of the majority of the court in the above entitled cause.

Second: The other case on which the opinion of Mr. Justice Holmes is based, is *Road Improvement Dstrict No.* 2 v. *St. Louis Southwestern Railway Company,* 257 U. S. 547. The opinion in that case written by Mr. Chief Justice Taft, clearly demonstrates that the reasoning of that opinion has no application to the instant case. The administrative proceeding in the assessment of benefits in the instant case was never transferred to a court. No notice of the assessment of benifits was published as required by Act 322 and the validity of the assessment depends not upon a judicial proceeding, but upon a legislative approval of the assessment by special Act 45.

From the above it is apparent that the opinion of Mr. Justice Holmes in this case in fact overrules two important cases, *Meriwether* v. *Garrett,* 102 U. S. 472, and *Thompson* v. *Allen County,* 115 U. S. 550, and is a clear invasion by the judiciary of the Federal Government of the legislative functions of the State of Arkansas.

Three: Because the United States District Court in its decree undertook to make a new and independent assessment of benefits, thereby invading the legislative functions of the State of Arkan-

sas and overriding the provisions of clause eight of Act 322 under which the Road District in controversy was created, said section eight providing as follows:

> "The commissioners may, not oftener than once a year, reassess the benefits in said district; but in the event the district shall have incurred an indebtedness or issued bonds, the total amount of the assessed benefits shall never be diminished."

The decree of the United States District Court providing *inter alia* as follows:

> "But in view of the fact that only $125,000 of said bonds will be outstanding, the rate of taxation fixed at the time of the issuance of said bonds will be reduced 2% upon the assessment of benefits in each of the years 1922 to 1924 inclusive, and 3.2% of the amount of the assessed benefits for each of the years 1925 to 1941 inclusive."

Even though it be conceded for the purpose of the argument that United States District Court (there being diversity of citizenship) might have jurisdiction to foreclose a mortgage, the decree rendered in the instant case was solely for the collection of these assessments by a Receiver appointed by the Federal Court. This was done in defiance of the plain provisions of the constitution of the United States and of the State of Arkansas, dividing both the Government of the United States and the State of Arkansas into its three coordinate departments, legislative, executive and judicial, and in defiance of the long line of decisions of this Court and especially of the decision of this

Court by Mr. Justice Miller in the case of *Thompson* v. *Allen County*, 115 U. S. 550.

Four: Because the Court in its opinion by Mr. Justice Holmes has entirely ignored the case of *Kline* v. *Burke Construction Company*, 206 U. S. page 226, decided November 20th, 1922, opinion by Mr. Justice Sutherland.

WHEREFORE, Respondent, petitioner herein, respectfully asks the Court to reconsider its judgment of reversal, and to grant a reargument of this case. Respondent, petitioner herein, further prays the Court to recall the mandate heretofore sent by it to the United States Circuit Court of Appeals for the Eighth Circuit.

HENRY D. ASHLEY,
Attorney for Respondent.

J. F. GAUTNEY,
Of Counsel.

I hereby certify that the foregoing petition for a re-hearing is, in my opinion, well founded, and is not made for the purpose of delay.

HENRY D. ASHLEY.